NOT TO BE PUBLISHED

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

C062640

Plaintiff and Respondent,

(Super. Ct. No. CRF0802836)

v.

PATRICK DEAN POTTER,

Defendant and Appellant.

A jury found defendant Patrick Dean Potter guilty of possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a)), transporting methamphetamine (Health & Saf. Code, § 11379, subd. (a)), driving under the influence of a controlled substance (Veh. Code, § 23152), and being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)). Defendant admitted he was previously convicted of a serious or violent felony under Penal Code section 1170.12 and previously served a term in prison under Penal Code section 667.5. After denying defendant's motion to dismiss the prior strike

conviction, the trial court sentenced defendant to an aggregate term of nine years in state prison.

Defendant appeals the trial court's denial of his motion to dismiss the prior strike conviction. We affirm the judgment.

FACTS AND PROCEEDINGS

In February 2008, defendant was stopped by a California Highway Patrol officer because the vehicle defendant was driving had a broken tail light and a defective muffler. When the officer approached defendant, the officer smelled burnt marijuana. The officer also noticed defendant's eyes were red and glassy, his pupils were constricted, and he was "fidgety." Defendant admitted he was under the influence, having used methamphetamine earlier that day.

As the officer was arresting defendant, a fellow officer saw a plastic bag on the ground at defendant's feet. The bag contained a white crystalline substance that subsequent testing revealed to be 1.24 grams of methamphetamine. Defendant admitted the methamphetamine was his and the bag had fallen out of his boxer shorts.

Defendant was arrested and charged with possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)--count 1), transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)--count 2), driving under the influence of a controlled substance (Veh. Code, § 23152--count 3), and being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)--count 4). It was further alleged that

defendant had a 1998 strike conviction (Pen. Code, § 1170.12) for making a criminal threat (Pen. Code, § 422), and a prior prison term (Pen. Code, § 667.5) arising out of a 2000 conviction of corporal injury to a cohabitant (Pen. Code, § 273.5, subd. (a)).

A jury found defendant guilty on all charges. Defendant admitted the sentencing enhancement allegations, then asked the court to exercise its discretion to dismiss the prior strike conviction pursuant to People v. Superior Court (Romero) (1996) 13 Cal.4th 497 (Romero)). The trial court denied his request. Defendant was sentenced to an aggregate term of nine years in prison: the upper term of four years on count 2, doubled under the three strikes law, and one additional, consecutive year for the prison prior. The court stayed the term on count 1 pursuant to Penal Code section 654, suspended sentence on count 4, and imposed a concurrent term of six months in jail on count 3.

DISCUSSION

Defendant contends the trial court abused its discretion when it refused to strike the prior conviction enhancement. He argues the nature of his current felony and prior strike conviction, and the particulars of his background, character, and prospects, place him "outside the spirit" of the three strikes law.

Penal Code section 1385 gives the trial court authority, on its own motion or upon application of the prosecution, "and in furtherance of justice," to order an action dismissed. (Pen.

Code, § 1385, subd. (a).) In Romero, supra, 13 Cal.4th 497, the California Supreme Court held a trial court may utilize Penal Code section 1385 to strike or vacate a prior strike for purposes of sentencing under the three strikes law, "subject, however, to strict compliance with the provisions of [Penal Code] section 1385 and to review for abuse of discretion."

(Romero, at p. 504.) Likewise, a trial court's "failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard."

(People v. Carmony (2004) 33 Cal.4th 367, 374 (Carmony).)

In ruling on a Romero motion, the trial court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (People v. Williams (1998) 17 Cal.4th 148, 161 (Williams).)

Dismissal of a strike is a departure from the sentencing norm. Therefore, in reviewing a Romero decision, we will not reverse for abuse of discretion unless the defendant shows the decision was "so irrational or arbitrary that no reasonable person could agree with it." (Carmony, supra, 33 Cal.4th at p. 377.) Reversal is justified where the trial court was unaware of its discretion to strike a prior strike or refused to do so at least in part for impermissible reasons. (Id. at p. 378.)

But where the trial court, aware of its discretion, "'balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance' [citation]." (Ibid.)

In support of his claim that the trial court abused its discretion, defendant argues the court erroneously relied on defendant's drug addiction and mental illness, along with defendant's neglect of his children and dim prospects for employment. He also notes that he now shows a "willingness and ability to rehabilitate himself," and while in custody "accepted God."

Defendant further argues his background suggests this is an exceptional case warranting dismissal of the strike. According to defendant, he "suffered a dreadful childhood." Defendant describes his childhood as "parentless," pointing out that he was both a substance abuser and a ward of the court at age eight.

Defendant argues the nature and circumstances of his current offenses and the strike offense place him outside the spirit of the three strikes law. According to defendant, the current crime was a "minor drug-related offense," and "most of [his] criminal history involved minor drug-addiction issues and victimless behavior"

Defendant further contends his prior strike is remote in time (i.e., 1998) and was not particularly serious.

All of the foregoing was laid out to the trial court by defense counsel. In denying defendant's motion, the court explained: "[E]ven a superficial analysis of you and your background would quickly cause me to conclude that you do not fall outside of the spirit of the three strikes law. I'm sorry for you, but that is the circumstances in which you find yourself legally. And it is not really a matter of discretion or choice for me because, as I go through this analysis, these are factors that just leap out at me. They're not all what I would regard as horrible, but there has to be unusual circumstances; something that draws you out of the law, the three strikes law, and the combination of things here just doesn't do that. [Your] serious and violent felony isn't the [worst] of them. Absolutely not. I agree with Ms. Campbell. It--I think would be overstating to say that it was an afterthought.

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"What is more concerning to me are the particulars of your background and your character and your prospects. And again, I don't mean to be hurtful to you [defendant], but you are entitled to know why I'm doing what I am doing. In terms of your character, I see you've been convicted at least three separate times for criminal charges. These are crimes . . . involving what we call moral turpitude, at least two of them are. Those are crimes that we would normally assign this to; that is to say a willingness to do evil. Now that doesn't make

a very positive statement . . . about [you] or your character. . . .

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"You are a parent who has failed, apparently, in every respect to raise your child or children, which is also in my view a horrible mark against your character. You have, over your life, chosen to follow the path of addiction to the detriment of your children. And they are paying a price for that in some way, as I suspect you may be, even now or in the future. But those are very negative reflections on a man's character . . ., because the choice that you made is so--so demonstrably flawed that it would be --it would be an abuse of me to conclude or just paper over this failure of your character on your part to raise your children and choosing addiction, choosing drugs and alcohol over your children. That is another thing weighing heavily on my mind. You have a history, an admitted history, of alcoholism or drug abuse addiction, which reflects poorly on your prospects for the future. You know, I know today and don't mean to suggest that it is not in your heart, that you have these good intentions, but the road the places we'd rather not go, is paved with good intentions at times. It is too late today to tell me that you have the best of intentions when those intentions should have surfaced at a much earlier point in your life. And that fact that they did not do so, gives me a very grave concern about your prospects in the future.

"You have an admitted mental health history. According to [the] report, you are bipolar, you suffer from post traumatic stress disorder and ADHD. Which I don't hold against you, again, are matters of concern to me in assessing how likely it is that you'll be able [to] master the things you've been unable to master in your life so far.

"You also have a very limited work experience as far as I can tell. Now, that is accounted for the fact that you've chosen alcohol and drugs over the course of your young life, instead of pursuing more positive pursuits like work and raising children, those sorts of things."

It is obvious from the foregoing comments on defendant's personal history, character and prospects and the court's consideration of the entire record, the trial court understood its discretion to grant the motion to strike but concluded this case does not warrant such extraordinary action.

Notwithstanding defendant's stated commitment to rehabilitation and newfound relationship with God, the court concluded this was too little too late. Defendant has a criminal record stretching back to 1998, when he was only 19 years old and he was convicted of battery. This was followed by convictions on two misdemeanor offenses and the prior strike offense for making a terrorist threat, all in 1998.

Defendant was convicted of additional offenses in 1999, 2001, and 2002. In 2001, he was sent to state prison. Following his release on parole, defendant violated parole seven times between 2003 and 2007. After he finished his prison term,

defendant was convicted of another drug-related offense in 2008, for which he was serving probation when he committed the current offense.

The three strikes law establishes sentencing norms and "creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (Carmony, supra, 33 Cal.4th at p. 378.) This presumption will only be rebutted in an "extraordinary case--where the relevant factors described in Williams, supra, 17 Cal.4th 148, manifestly support the striking of a prior conviction and no reasonable minds could differ" (Carmony, at p. 378.) However, "[w]here the record is silent [citation], or '[w]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance' [citation]." (Ibid.)

The record here demonstrates the trial court exercised its discretion and concluded this is not such an extraordinary case as to warrant dismissal of the strike. Under the facts and circumstances presented, we cannot say this conclusion is "so irrational or arbitrary that no reasonable person could agree with it." (Carmony, supra, 33 Cal.4th at p. 377.) We therefore find no abuse of discretion.

The recent amendments to Penal Code section 4019 do not operate to modify defendant's entitlement to credit, as he has a prior conviction for a serious or violent felony. (Pen. Code,

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